

Title	Transfer of Appellate Division Cases to the Court of Appeal (repeal and adopt Cal. Rules of Court, rules 61–69 and 106–107)
Summary	The proposed revisions of rules 61–69 and 106–107 would modify the procedures for transferring cases from the appellate division of the superior court to the Court of Appeal, including implementing a limited review and remand procedure as suggested by the California Supreme Court in <i>Snukal v. Flightways Manufacturing, Inc.</i> (2000) 23 Cal.4th 754 and authorizing parties to petition the Court of Appeal to transfer a case when the superior court has denied certification and declined to publish the case. The language in this series of rules has also been simplified, using “plain English” drafting techniques, and updated to reflect various changes in the law since rules 61–69 were first adopted. Because the revisions are extensive, the existing rules would be repealed and new rules adopted.
Source	Appellate Advisory Committee Justice Joyce L. Kennard, Chair
Staff	Heather Anderson, 415-865-7691, <a href="mailto:heather.anderson@jud.ca.gov">heather.anderson@jud.ca.gov</a> Peter Belton, 415-865-7094, <a href="mailto:peter.belton@jud.ca.gov">peter.belton@jud.ca.gov</a>
Discussion	<p>These proposed revisions would make extensive changes, both substantive and nonsubstantive, to the rules that govern transferring cases from the appellate division of the superior court to the Court of Appeal. The main substantive changes on which the committee specifically requests public comment are discussed below.</p> <p><i>Limited Review on Transfer to the Court of Appeal</i></p> <p><b><i>In Snukal v. Flightways Manufacturing, Inc., the Supreme Court held that, under existing statutes and court rules, the Courts of Appeal do not have discretionary authority to review only part of a decision in a case transferred from the appellate division of the superior court and to thereafter remand the matter to the appellate division for resolution of the remaining issues. (Id. at pp. 761–776.) However, the court went on to suggest that the Judicial Council consider amendments to the rules of court, as authorized by Code of Civil Procedure section 911, to implement a limited review and remand procedure analogous to that found in rules 25, 29.2, and 29.4 for Supreme Court review of Court of Appeal decisions, as follows:</i></b></p> <p>“[T]he applicable constitutional and statutory provisions themselves do not create insuperable obstacles to the establishment of a limited review and remand procedure in</p>

such cases. The current constitutional provision relating to the appellate jurisdiction of the Courts of Appeal does not explicitly preclude such a practice but rather provides simply that ‘courts of appeal have appellate jurisdiction when superior courts have original jurisdiction *and in other causes prescribed by statute.*’ (Cal. Const., art. VI, § 11, italics added.) The applicable statutory provision that authorizes a Court of Appeal to transfer an appeal from the appellate department or division ‘to secure the uniformity of decision or to settle important questions of law’ (Code Civ. Proc., § 911), in turn, also does not expressly prohibit a limited review-and-remand procedure, but rather directs that a Court of Appeal may order transfer for hearing and decision ‘*as provided by rules of the Judicial Council.*’ (*Ibid.*, italics added.) Although the language of the *current* rules (most clearly, rule 68) is inconsistent with a Court of Appeal’s exercise of authority to remand an appeal to the appellate department for resolution of remaining issues, the language of section 911 does not appear to preclude the Judicial Council from revising the current rules of court to implement such a limited review and remand procedure. The council may do so if, upon examination of the purpose of the relevant statutory provisions, the council determines that, in furtherance of the effective administration of justice, it is appropriate to afford the Courts of Appeal a means to exercise the discretionary authority contemplated by section 911 in a manner that is analogous to that now available to this court in carrying out our comparable function of securing uniformity of decision and resolving important issues of law.”

(*Snukal, supra*, 23 Cal.4th at p. 776.)

Proposed rules 64(e) and 68(a) would specifically confer upon the Courts of Appeal the discretionary authority—similar to that of the Supreme Court under existing rules 25, 29.2, and 29.4—to hear and decide only limited issues in a transferred case. Proposed rule 64(e) would authorize the Court of Appeal, on or after ordering transfer, to limit the issues that the parties may brief and argue. This rule tracks the wording of a similar provision in the rules governing Supreme Court review (former rule 29.2(b), now proposed revised rule 29(a), circulated for comment in the winter 2002 rules cycle). Proposed rule 68 would authorize the Court of Appeal to decide only such limited issues and to retransfer the case to the appellate division for decision

on any remaining issues.

### **Exclusion of Small Claims Appeals from Transfer Jurisdiction**

Proposed rule 61 would clarify that small claims appeals are excluded from the transfer jurisdiction of the Court of Appeal. This proposed exclusion is based on the belief that litigants have other adequate means to obtain review in these cases. Defendants in small claims cases already have a right to review by trial de novo in superior court of claims by plaintiffs and plaintiffs have a similar right with regard to claims by defendants (Code Civ. Proc., §116.710). Further discretionary review may also be sought by petition for mandamus (see, for example, *Green v. Superior Court* (1974) 10 Cal.3d 616). In addition, plaintiffs are not required to file in small claims court; they have the option of filing their cases initially as “limited civil actions” in superior court (Code Civ. Proc., §85) if they prefer the benefits of a direct appeal after judgment, that is, to the appellate division of that court. A shorter path to finality of small claims actions also promotes the legislative intent to “resolve minor civil disputes expeditiously, inexpensively, and fairly.” (Code Civ. Proc., §116.120, subd. (b); *General Electric Capital Auto Financial Services, Inc. v. Appellate Division* (2001) 88 Cal.App.4th 136, 142.)

### *Authority to Certify a Case for Transfer*

Currently, rule 63(a) provides that certification of a case for transfer may be made by a majority of the judges of the appellate department. Proposed new rule 63 (a)(2) would permit certification either by a majority of the appellate division judges to whom the cases was assigned or who decided the appeal or, if the case had not yet been assigned, by any two appellate division judges.

### *Petition to Transfer*

Proposed rule 64(a) and (b) would authorize parties to petition the Court of Appeal to transfer a case from the superior court appellate division. This proposed new procedure is intended to assist the Court of Appeal by opening the transfer process to input by the parties. This change would be consistent with Code of Civil Procedure section 911, which expressly authorizes transfer when the superior court certifies the case under rule 63 **or** the Court of Appeal determines that transfer is necessary to secure uniformity of decision or to settle an important question of law.

Rule 64(b)(1) would impose two prerequisites on the exercise of the right to petition for transfer. First, a petition could be filed only if the party applied to the appellate division for certification under rule 63

and that application was denied. This is essentially an exhaustion of remedies requirement and is intended to prevent unnecessary petitions to the Courts of Appeal. Second, a petition for transfer could be filed only if the appellate division did not certify its opinion for publication. If the opinion is certified for publication, a petition is unnecessary since the Court of Appeal has the power to order transfer on its own motion under proposed rule 64(a) and, as discussed further below, the party could urge the court to exercise that power by means of a letter under proposed subdivision (d)(1).

Based on an informal survey of the appellate divisions, and on the experience of committee members who have served in those courts, the committee believes that the number of applications for transfer certification is quite small and the number of unsuccessful applications even smaller. The economics of appellate division practice would also militate against any large influx of petitions for transfer. Thus, it is the sense of the committee that the procedure proposed in rule 64(a) would enhance the authority of the Court of Appeal without unduly increasing its workload.

#### *Letter Supporting or Opposing Transfer*

Proposed rule 64(d) would authorize parties to send letters to the Court of Appeal supporting or opposing transfer either when the appellate division certifies a case for transfer or when it certifies its opinion for publication. As with the proposed new petition procedure, this is intended to assist the Court of Appeal in making the transfer determination by opening the process to input by the parties. In addition, the committee is informed that this procedure is permitted in some districts. Authorizing this practice by statewide rule would thus equalize access for litigants who wish to address the Court of Appeal directly on the issue of transfer.

#### *Time to Transfer and Record on Transfer*

Proposed rules 64(c) and 65(b) include several changes to the time frame within which the Court of Appeal can order transfer and to the procedures for transmission of the record to the Court of Appeal that are intended to ensure that the Court of Appeal has a meaningful opportunity to review the record in the case before making a decision on transfer.

Currently, rule 62(b) provides that a transfer on certification may be made within 20 days after the record is filed with the Court of Appeal but that transfer on the court's own motion may be made within 20 days after the Court of Appeal receives the opinion of the appellate

department. Proposed rule 64(c) would instead provide that, both when a case is certified for transfer and when the court orders transfer on its own motion, the decision about transfer may be made within 20 days after the record on transfer is filed in the Court of Appeal. Currently, rule 64(b) requires transmission of the record on transfer only when the superior court certifies the case for transfer or when the clerk receives an order of the Court of Appeal transferring the case on its own motion. Thus the Court of Appeal currently receives a copy of the record in cases certified for publication only after it has ordered a transfer on its own motion. Proposed rule 65(b) would instead require that, in every case in which the appellate division certifies an opinion for publication, the clerk must send the record to the Court of Appeal along with the copy of the opinion. Proposed rules 64(c) and 65(b) would also establish the time frame for transfer and procedures for record transmission under the proposed petition for transfer procedure. Finally, while current rule 62(b) allows the Court of Appeal a single 20-day period to decide whether to order transfer, proposed rule 64(c) would allow the Court of Appeal to order an extension of up to 20 days in the time for ordering transfer.

#### *Oral Argument*

Currently, rule 62(d) provides that “Unless oral argument is waived, the case shall be placed on the calendar when the transfer is ordered.” Rule 62(e) also requires the Court of Appeal clerk to notify the parties of the time for filing any briefs permitted and “the date of oral argument.” These provisions appear to require the Court of Appeal to immediately place a transferred case on its calendar for oral argument. Such a requirement is impossible to reconcile with the wide variety of current calendaring practices of the Courts of Appeal. Therefore, proposed rule 64(e) and (f), the successor provisions to rule 62(d) and (e), would eliminate this language. As noted previously, proposed rule 64(e)(1) provides that the Court of Appeal may specify the issues to be briefed and argued and 64(e)(2), which is modeled on the rule relating to Supreme Court oral argument (former rule 29.2(b), now proposed revised rule 29(a)(2), circulated for comment in the winter 2002 cycle), allows the court, upon reasonable notice, to expand or contract the issues to be argued. Proposed rule 64(f)(2) would require the clerk to notify the parties of “the issues to be briefed and argued,” if specified by the Court of Appeal. Although those issues may be stated in the transfer order itself, the requirement of a separate notice ensures that this important matter does not escape the parties’ attention.

#### *Alternatives Considered by the Committee*

The committee also invites comment on the following alternatives, which are not reflected in the attached proposal but which were discussed by the committee during its deliberations on the proposal:

- Whether briefs on the merits should be required in each case transferred to the Court of Appeal or, as in the attached proposal, only as ordered or—upon request—as permitted by the presiding justice.
- Whether the time periods for briefing, the length of briefs submitted, and the amount of time permitted for oral argument in transferred cases should be the same as those provided for appeals that are initially filed in the Court of Appeal.
- Whether, in every case adjudicated to judgment therein, the appellate division should be required to prepare an opinion that satisfies the minimum standards for a “decision in writing with reasons stated” applicable to decisions issued by the Court of Appeal. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1262–1264.)

#### *Language and Formatting Changes*

In addition to the proposed substantive changes to these rules, the language in this proposed series of rules has also been simplified, using “plain English” drafting techniques, and updated to reflect various changes in the law since rules 61–69 were first adopted. This has involved some reorganizing and renumbering of provisions. The major renumbering changes include:

- Provisions in the current rule 62 relating to the transfer procedures would be moved into proposed rules 63 and 64.
- Proposed rule 63(c) would address issues now covered in rule 66.
- Proposed rule 65 would address issues now covered in rule 64.
- Proposed rule 66 would address issues now covered in rule 65.
- Proposed rule 69 would address issues now covered in rule 68.

**NOTE:** Because the revisions to rules 61–69 and 106–107 are so extensive, it was impracticable to present the attached proposal in the usual format, using strikethrough marks to show deletions and underlining to show additions to the text. Instead, the existing rules would be repealed and these new rules would be adopted.

| Attachment

Rules 61–69 and 106–107 of the California Rules of Court would be repealed and adopted, effective January 1, 2003, to read:

**Rule 61. Scope of rules**

Rules 61 through 69 govern proceedings for transferring cases within the appellate jurisdiction of the superior court—other than appeals in small claims cases—to the Court of Appeal for review. Unless the context requires otherwise, the term “case” as used in these rules means cases within that jurisdiction.

**Rule 62. Transfer authority**

A Court of Appeal may order a case transferred to it for hearing and decision if the appellate division certifies under rule 63—or the Court of Appeal determines under rule 64—that transfer is necessary to secure uniformity of decision or to settle an important question of law.

**Rule 63. Certification**

**(a) Authority to certify**

- (1) The appellate division may certify a case for transfer to the Court of Appeal on its own motion or on a party’s application.
- (2) A case may be certified by a majority of the appellate division judges to whom the case has been assigned or who decided the appeal or, if the if the case has not yet been assigned, by any two judges of the appellate division.

**(b) Application for certification**

- (1) A party may serve and file an application for certification at any time after the record on appeal is filed in the appellate division and before the appellate division judgment is final in that court. The party may include the application in a petition for rehearing.
- (2) The application must explain why transfer is necessary to secure uniformity of decision or to settle an important question of law.



1                   (3) Within five days after the application is filed, any other party may  
2                   serve and file an opposition.

3  
4                   (4) No hearing will be held on the application. Failure to certify the  
5                   case is deemed a denial of the application.

6  
7                   **(c) Finality of appellate division judgments**

8  
9                   An appellate division judgment is final in that court as provided in rule 107.

10  
11                  **(d) Time to certify**

12  
13                  A case may be certified at any time after the record on appeal is filed in the  
14                  appellate division and before the appellate division judgment is final in that  
15                  court.

16  
17                  **(e) Contents of certification**

18  
19                  A certification must:

20  
21                   (1) briefly describe any conflict of decision—citing the decisions  
22                   creating the conflict—or important question of law to be settled;  
23                   and

24  
25                   (2) state whether there was a judgment on appeal and, if so, its date  
26                   and disposition.

27  
28                  **(f) Superior court clerk's duties**

29  
30                   (1) If the appellate division orders certification, the clerk must  
31                   promptly send a copy to the Court of Appeal clerk, the parties, and,  
32                   in a criminal case, the Attorney General.

33  
34                   (2) If the appellate division denies an application by order, the clerk  
35                   must promptly send a copy to the parties and, in a criminal case,  
36                   the Attorney General.

37  
38  
39                  **Rule 64. Transfer**

40  
41                  **(a) Authority to transfer on Court of Appeal's own motion or a party's**  
42                  **petition**

1  
2 The Court of Appeal may order transfer of a case on the court's own motion  
3 if the appellate division certifies its opinion for publication, or on a party's  
4 petition to transfer.  
5

6 **(b) Petition to transfer**  
7

8 (1) If the appellate division denies an application for certification and  
9 does not certify its opinion for publication, a party may serve and  
10 file in the Court of Appeal a petition to transfer the case to that  
11 court.  
12

13 (2) The petition must be served and filed within eight days after the  
14 appellate division judgment is final in that court and must show  
15 delivery of a copy to the appellate division.  
16

17 (3) The petition must explain why transfer is necessary to secure  
18 uniformity of opinion or to settle an important question of law.  
19

20 (4) Within seven days after the petition is filed, any other party may  
21 serve and file an answer.  
22

23 (5) The petition and any answer must comply as nearly as possible  
24 with rule 28(e).  
25

26 **(c) Time to transfer**  
27

28 (1) The Court of Appeal may order transfer:  
29

30 (A) after certification or on its own motion, within 20 days after  
31 the record on transfer is filed in the Court of Appeal; or  
32

33 (B) on petition to transfer, within 20 days after the petition is  
34 filed.  
35

36 (2) Within either period specified in (1), the Court of Appeal may  
37 order an extension not exceeding 20 days.  
38

39 (3) If the Court of Appeal does not timely order transfer, transfer is  
40 deemed denied.  
41

42 **(d) Letter supporting or opposing transfer**

(1) Except when a party files a petition to transfer under (b), any party may send the Court of Appeal a letter supporting or opposing transfer within seven days after a record on transfer is filed in that court. The letter must be served on all other parties.

(2) The letter must be double-spaced and must not exceed 1,400 words if produced on a computer or five pages if typewritten.

**(e) Limitation of issues**

(1) On or after ordering transfer, the Court of Appeal may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in those issues.

(2) Notwithstanding an order specifying issues under (1), the court may, on reasonable notice, order oral argument on fewer or additional issues or on the entire case.

**(f) Court of Appeal clerk's duties**

(1) When a transfer order is filed, the clerk must promptly send a copy to the superior court clerk, the parties, and, in a criminal case, the Attorney General.

(2) With the copy of the transfer order sent to the parties and the Attorney General, the clerk must send notice of the time to serve and file any briefs ordered under rule 66 and, if specified by the Court of Appeal, the issues to be briefed and argued.

(3) If the court denies transfer after certification or petition, the clerk must return the record on transfer and any exhibits to the superior court clerk and promptly send notice of the denial to the parties and, in a criminal case, the Attorney General.

(4) Failure to send any order or notice under this subdivision does not affect the jurisdiction of the Court of Appeal.

**Rule 65. Record on transfer**

1       **(a) Contents**

2  
3       The record on transfer must contain:

- 4  
5           (1) the original record on appeal prepared under rules 124–132 in a  
6               limited civil case or under rules 183–185 in a criminal case;  
7  
8           (2) any briefs filed in the appellate division; and  
9  
10          (3) any order or opinion of the appellate division.

11  
12       **(b) Clerks' duties**

- 13  
14          (1) The superior court clerk must promptly send the record on transfer  
15               to the Court of Appeal and notify the parties that the record was  
16               sent when:  
17  
18               (A) the appellate division certifies a case;  
19  
20               (B) the superior court clerk sends a copy of an appellate division  
21                   opinion certified for publication to the Court of Appeal under  
22                   rule 106; or  
23  
24               (C) the superior court clerk receives a copy of a petition to  
25                   transfer.  
26  
27          (2) The Court of Appeal clerk must promptly notify the parties when  
28               the record on transfer is filed.

29  
30  
31       **Rule 66. Briefs**

32  
33       **(a) Who may file**

- 34  
35          (1) After transfer, the parties may file briefs in the Court of Appeal  
36               only if ordered on a party's application or the court's own motion.  
37               The court must prescribe the briefing sequence in any briefing  
38               order.  
39  
40          (2) Instead of filing a brief, or as part of its brief, a party may join in  
41               or adopt by reference all or part of a brief in the same or a related  
42               case.

1  
2 **(b) Time to file**  
3

4 (1) The opening brief must be served and filed within 20 days after  
5 entry of the briefing order.  
6

7 (2) The responding brief must be served and filed within 20 days after  
8 the opening brief is filed.  
9

10 (3) Any reply brief must be served and filed within 10 days after the  
11 responding brief is filed.  
12

13 **(c) Additional service requirements**  
14

15 (1) Any brief of a defendant in a criminal case must be served on the  
16 prosecuting attorney and the Attorney General.  
17

18 (2) Every brief must show delivery of a copy to the appellate division  
19 from which the case was transferred.  
20

21 **(d) Form**  
22

23 No brief may exceed 5,600 words if produced on a computer or 20 pages if  
24 typewritten. In all other respects briefs must comply with rule 14.  
25  
26

27 **Rule 67. Stay of proceedings**  
28

29 When the appellate division certifies a case or the Court of Appeal orders  
30 transfer, further action by the appellate division—other than preparing and  
31 sending the record—is stayed until termination of the proceedings in the  
32 Court of Appeal.  
33  
34

35 **Rule 68. Disposition of transferred case**  
36

37 **(a) Decision on limited issues**  
38

39 The Court of Appeal may decide fewer than all the issues raised and may  
40 retransfer the case to the appellate division for decision on any remaining  
41 issues.  
42

1       **(b) Retransfer without decision**

2  
3           (1) The Court of Appeal may vacate a transfer order without decision  
4           and retransfer the case to the appellate division with or without  
5           directions to conduct further proceedings.

6  
7           (2) If the appellate division pronounced judgment before transfer and  
8           the Court of Appeal directs no further proceedings, the judgment is  
9           final when the appellate division receives the order vacating  
10          transfer and its clerk must promptly issue a remittitur.

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13       **Rule 69. Remittitur**

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15       **(a) Court of Appeal remittitur**

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17       The Court of Appeal clerk must promptly issue a remittitur when a decision  
18       of the court is final. The clerk must address the remittitur to the appellate  
19       division and send that court two copies of the remittitur and two file-stamped  
20       copies of the Court of Appeal opinion or order.

21  
22       **(b) Appellate division remittitur**

23  
24       On receiving the Court of Appeal remittitur, the appellate division clerk must  
25       promptly issue a remittitur if there will be no further proceedings in that  
26       court.

27  
28       **(c) Documents to be returned**

29  
30       Each reviewing court clerk must return all original records, documents, and  
31       exhibits with the remittitur but need not return any certification, transcripts on  
32       appeal, briefs, or notice of appeal.

33  
34  
35       **Rule 106. Decisions**

36  
37       **(a) Time to decide**

38  
39       The appellate division must hear and decide each appeal at the session in  
40       which it was set for hearing unless, for good cause entered in the minutes, the  
41       court continues the case to another date or orders it submitted on briefs to be  
42       filed.

1  
2 **(b) Written opinions**

3  
4 Appellate division judges are not required to prepare a written opinion in any  
5 case but may do so when they deem it advisable or in the public interest.  
6 Appellate division opinions certified for publication must comply to the  
7 extent practicable with the *California Style Manual*.  
8

9 **(c) Transmitting opinions**

10  
11 When the judgment is final as to the appellate division in a case in which the  
12 opinion is certified for publication, the clerk must immediately send to the  
13 Reporter of Decisions two paper copies and one electronic copy in a format  
14 approved by the Reporter, and to the Court of Appeal for the district another  
15 copy bearing the notation, “To be published in the Official Reports.” The  
16 Court of Appeal clerk must promptly file that copy or make a docket entry  
17 showing its receipt.  
18  
19

20 **Rule 107. Finality, modification, and rehearing**

21  
22 **(a) When judgment is final**

23  
24 An appellate division judgment is final:

- 25  
26 (1) 15 days after judgment is pronounced; or  
27  
28 (2) if a party timely files a petition for rehearing or application for  
29 certification, 30 days after judgment is pronounced or when all  
30 such petitions or applications are denied, whichever is earlier.  
31

32 **(b) Modification of judgment**

33  
34 The appellate division may modify its judgment until the judgment is final in  
35 that court. An order modifying an opinion must state whether it changes the  
36 appellate judgment. A modification that does not change the appellate  
37 judgment does not extend the time of the judgment’s finality. If a  
38 modification changes the appellate judgment, the finality period runs from  
39 the filing date of the modification order.  
40

41 **(c) Rehearing**

- 1  
2       (1) On petition of a party or on its own motion, the appellate division  
3       may order rehearing at any time before its judgment is final.  
4  
5       (2) A party may serve and file a petition for rehearing within 15 days  
6       after judgment is pronounced or a modification order changing the  
7       appellate judgment is filed.  
8  
9       (3) Any answer to the petition must be served and filed within 8 days  
10      after the petition is filed.  
11  
12      (4) The petition and answer must comply as nearly as possible with  
13      rule 14.  
14  
15      (5) If the appellate division orders rehearing, it may place the case on  
16      calendar for further argument or submit it for decision.  
17

18      **(d) Extensions of time**  
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20      The periods specified in this rule may not be extended except as provided in  
21      Code of Civil Procedure section 12a.